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Before the
FEDERAL COMMUNICATIONS COMMISSION
 Washington, D.C. 20554

MAR 14 2001

FEDERAL COMMUNICATIONS COMMISSION
 OFFICE OF THE SECRETARY

In the Matter of)	
)	
Promotion of Competitive Networks)	WT Docket No. 99-217
in Local Telecommunications Markets)	
)	
Implementation of the Local Competition)	CC Docket No. 96-98
Provisions of the Telecommunications Act)	
of 1996)	

OPPOSITION TO VERIZON WIRELESS RECONSIDERATION PETITION

VoiceStream Wireless Corporation ("VoiceStream") opposes the reconsideration petition submitted by Verizon Wireless ("Verizon") asking that the Commission exclude providers of commercial mobile radio services ("CMRS") from the scope of new Rule 64.2300, which prohibits carriers from entering into exclusive contracts that restrict access to commercial multiple tenant environments ("MTEs").¹ Specifically, Verizon wants the Commission to sanction an arrangement whereby one CMRS licensee could preclude its competitors from providing service to their customers.

CMRS carriers generally, and PCS licensees entering new markets, in particular, are finding it increasingly difficult to locate suitable sites on which to place the antennas essential to their services. Local zoning authorities, responding to growing NIMBYism (not in my back yard), are increasingly limiting the areas where CMRS carriers can place their towers or antenna attachments. Local governments continue to enact and enforce

¹ See Verizon Wireless Petition for Reconsideration, WT Docket No. 99-217 (Feb. 12, 2001). See also Reconsideration Report No. 2466 (Feb. 20, 2001), published in 66 Fed. Reg. 12510 (Feb. 27, 2001); Pro-

ordinances imposing radio frequency (“RF”) obligations on carriers (e.g., conduct RF emissions tests as a condition to retaining leases) — even though courts have held repeatedly that the FCC has exclusive jurisdiction over RF issues and that local RF laws are therefore null and void.² Several courts have recently misapplied the Communications Act in holding that a local government may preclude a carrier from providing service in its federally authorized licensed service area if a competitor in the area already offers service.³ Demands by State Historic Preservation Officers (“SHPOs”) further limit the areas where a licensee can build a tower or attach an antenna. Some land/building owners, realizing the limited choices available to wireless carriers, are beginning to demand exorbitant fees for a site lease. Verizon now wants the right to interpose yet another hurdle — namely, the ability to execute exclusive contracts with owners of commercial MTEs that would preclude the owners from considering similar arrangements with other CMRS carriers.

Verizon contends that new Rule 64.2300 prohibition on exclusive contracts does “not make sense” as applied to CMRS because “[i]n most instances” attaching an antenna to a particular building is not essential to providing service:

In general, CMRS provides do not need or require access to any particular building in order to provide service within a building or to its tenants. Rather, in order to provide services to the tenants of a particular building,

motion of Competitive Networks in Local Telecommunications Markets, WT Docket No. 99-217, *First Report and Order*, FCC 00-366 (Oct. 25, 2000)(“MTE Order”).

² See, e.g., *Freeman v. Burlington Broadcasting*, 204 F.3d 311 (2d Cir. 2000); *Southwestern Bell Wireless v. Johnson County*, 199 F.3d 1185 10th Cir. 1999). See also H.R. Conf. No. 97-765, at 33 (1982)(“Such [RF] matters shall not be regulated by local or state law, nor shall radio transmitting apparatus be subject to local or state regulation Rather, the Conferees intend that regulation of RFI phenomena shall be imposed only by the Commission.”).

³ See, e.g., *Omnipoint v. Newtown Township*, 219 F.3d 240 (3d Cir., July 13, 2000), *cert. denied*, 121 S. Ct. 441 (Nov. 6, 2000); *Sprint Spectrum v. Willoth*, 176 F.3d 630 (2d Cir. 1999).

CMRS providers use transmitters which may be located either on the building or in adjacent sites.⁴

VoiceStream agrees that, *in general*, a particular site may not be an essential facility. However, there can be circumstances (*e.g.*, restrictive zoning, topology, traffic patterns, owners of potential sites unwilling to lease space) where a particular site can be the only one realistically available to a CMRS carrier. Indeed, if CMRS providers “cannot affect competition by entering into exclusive access arrangements with building owners” as Verizon asserts,⁵ there would be no need for a CMRS carrier to enter into an exclusive arrangement in the first place.

Verizon further contends that, in adopting new Rule 64.2300, “the FCC does not appear to have considered the merits of extending the rule to CMRS providers.”⁶ The Cellular Telecommunications & Internet Association (“CTIA”), however, told the Commission that it “supports . . . the effort to help ensure that competitive telecommunications service providers, including CMRS and non-CMRS wireless services, have reasonable and non-discriminatory access to rights-of-way, buildings, rooftops and facilities in multiple tenant environments.”⁷

The distinction that Verizon proposes to draw — exclusive contracts are permitted for CMRS carriers but prohibited for non-CMRS wireless carriers⁸ — is also not workable. As CTIA has noted, CMRS providers “are now permitted to offer fixed serv-

⁴ Verizon Wireless Petition at 3 (emphasis added).

⁵ *Id.*

⁶ *Id.* at 3.

⁷ CTIA Comments, Docket No. 99-217, at 2 (Aug. 27, 1999)(emphasis in original).

⁸ See Verizon Wireless Petition at n.6.

ices”⁹ and, as a result, “CMRS and non-CMRS fixed wireless service providers must be treated similarly with respect to any Commission action that provides reasonable and non-discriminatory access to rights-of-way, buildings, rooftops, and facilities in multiple tenant environments.”¹⁰

Notably absent in Verizon’s petition is any discussion of how the public interest would be promoted by its proposal. In fact, the Verizon proposal is inconsistent with the uniform policy of the federal government. Since establishing the CMRS classification in 1993, Congress has sought “to foster the growth and development of mobile services” and to promote “increased competition and subscriber choice.”¹¹ Less than two years ago, Congress reaffirmed its policy to “encourage the rapid deployment of wireless telecommunications facilities,” expressing concern that “in many areas across the country, there are ‘holes’ or ‘dead zones’ in the wireless network, where a wireless call cannot be transmitted due to the absence of a nearby cellular or personal communications services (PCS) antenna.”¹² Congress was unequivocal in declaring that it “believes strongly that the construction and operation of seamless, ubiquitous, reliable wireless systems serve the public interest.”¹³

Similarly, in 1995 then President Clinton issued a memorandum directing federal agencies to develop procedures to facilitate the siting of CMRS antennas on federal property,¹⁴ and the General Services Administration (“GSA”) subsequently issued guidelines

⁹ *Id.* at 3.

¹⁰ CTIA Reply Comments, Docket No. 99-217, at 5 (Sept. 28, 1999).

¹¹ H.R. Rep. No. 103-111, 103d Cong., 1st Sess. 261-62 (1993).

¹² H.R. Rep. No. 106-25, 106th Cong., 1st Sess. 4 (1999).

¹³ *Id.* at 9.

¹⁴ See President Clinton, Memorandum, “Facilitating Access to Federal Property for the Siting of Mobile Services Antennas” (Aug. 10, 1995).


to facilitate such siting.¹⁵ The Wireless Bureau itself reportedly “encourag[es] sister agencies to, wherever feasible, lease federal property to wireless licensees.”¹⁶

Given this uniform federal policy to facilitate CMRS tower siting on federal property, it would be odd indeed for the Commission now to sanction policies that would impose new hurdles on the ability of CMRS licensees to locate their antennas on certain private property.

For all the foregoing reasons, VoiceStream respectfully requests that the Commission deny the reconsideration petition submitted by Verizon Wireless.

Respectfully submitted

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March 14, 2001

¹⁵ See GSA, “Placement of Commercial Antennas on Federal Property,” 62 Fed. Reg. 32611 (June 16, 1997). See also www.gsa.gov/Portal/offering.jsp?OID=114914.

¹⁶ Radio Communications Report at 16 (Dec. 14, 1998).

CERTIFICATE OF SERVICE

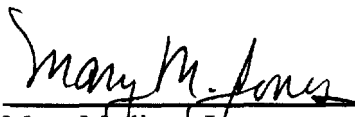
I, Mary Madigan Jones, hereby certify on that on this 14th day of March 2001, I served a copy of the foregoing VoiceStream Wireless Corporation Opposition to Verizon Wireless Reconsideration Petition by hand delivery to the following persons:

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